

The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

What is the liability of the Kansas Workers Compensation Fund, if any?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant, a Boeing employee for four and one-half (4 1/2) years, initially had problems with his right shoulder in 1990. He went to the doctors at Boeing Central Medical and at one time was placed under a fifty (50) pound lifting restriction. Claimant's uncontradicted testimony is that his job required that he violate that limitation on a regular basis.

Claimant first began developing problems with his hands and wrists, with his right hand first becoming symptomatic, in June 1992. He did not discuss this problem with anyone at Boeing until December 2, 1992, at which time he was referred to Dr. James L. Gluck by Boeing Central Medical. Dr. Gluck examined the claimant on December 8, 1992, and diagnosed shoulder impingement and bilateral carpal tunnel syndrome. Dr. Gluck examined claimant on January 5, 1993 and again on February 9, 1993. Claimant's symptoms both times were the same. On January 19, 1993, claimant was laid off from Boeing as a result of a general economic layoff. When the doctor examined claimant on March 30, 1993, claimant had a complete resolution of his symptoms with the numbness and paresthesia being gone. Claimant and respondent have resolved their differences in this matter leaving only the liability of the Kansas Workers Compensation Fund for determination by the Appeals Board.

Respondent contends claimant was shifted to a lighter job approximately sixty (60) days prior to his termination as result of the symptomatology to his hands. Claimant's testimony contradicts this allegation. Claimant was moved to a different job prior to notifying Boeing of his bilateral hand problems. Claimant testified that it was Boeing policy, any time an employee was to be laid off, to ship that employee to a lighter job approximately sixty (60) days prior to the layoff. Claimant's transfer to the lighter job would have occurred sometime in mid-November 1992. This was approximately two (2) weeks before claimant notified Boeing of his hand problems. Claimant further testified that the job he was transferred to was easier than the job he had been previously working and his condition did not worsen during the last sixty (60) days of his employment. This testimony is supported by the medical records of Dr. Gluck, which indicate during his examinations between December 2, 1992 and February 9, 1993 claimant's symptoms did not worsen.

The purpose of the Workers Compensation Fund is to encourage employment of persons handicapped as a result of specific impairments by relieving employers wholly, or partially, of workers compensation liability resulting from compensable accidents suffered by those employees. K.S.A. 44-567(a); Morgan v. Inter-Collegiate Press, 4 Kan. App. 2d 319, 606 P.2d 479 (1980).

Liability will be assessed against the Workers Compensation Fund when an employer shows that it knowingly hired or retained a handicapped employee who subsequently suffered a compensable work-related injury. An employee is handicapped under the act if the employee is "afflicted with an impairment of such character as to constitute a handicap in obtaining or retaining employment." Carter v. Kansas Gas & Electric Co., 5 Kan. App. 2d 602, 621 P.2d 448 (1980).

The employer has the burden of proving it knowingly hired or retained a handicapped employee. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871, (1984).

K.S.A. 44-567(b) provides in part:

"In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge."

The evidence shows, with regard to claimant's right shoulder, that the employer was aware claimant suffered a problem in 1990. Respondent's contention that claimant was in some way handicapped is contradicted by respondent's requirement that claimant violate what restrictions were placed upon claimant in the normal course of claimant's job. It is difficult to comprehend an employer considering someone to be a handicapped employee, while at the same time ignoring medical restrictions dealing with the alleged handicap.

With regard to the bilateral carpal tunnel, respondent was not made aware of claimant's problem until December 2, 1992. Claimant's testimony coupled with the medical records of Dr. Gluck verify that claimant suffered no additional injury during the time period December 2, 1992 through claimant's last day of employment January 19, 1993. In order for respondent to be entitled to reimbursement from the Kansas Workers Compensation Fund, the claimant must suffer a compensable work-related injury after having been handicapped due to a preexisting impairment. There is no indication that respondent was aware of claimant's carpal tunnel syndrome prior to December 2, 1992 and no indication that claimant suffered additional subsequent compensable injuries after that date.

The Appeals Board finds, based upon the record as a whole, respondent has failed to prove knowledge of a handicapped employee, and further that respondent has failed to prove claimant suffered a compensable work-related injury after respondent was made aware of claimant's physical problems.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated November 8, 1994, assessing 50% of the liability against the Kansas Workers Compensation Fund, shall be and herein is reversed and respondent is denied reimbursement from the Kansas Workers Compensation Fund for injuries suffered by claimant during the period June 25, 1992 through January 19, 1993.

The Appeals Board further finds that the Workers Compensation Fund shall be responsible for its own attorney's fees in the defense of this matter.

The Appeals Board further finds that the fees necessary to defray the administration of the workers compensation act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Deposition Services	
Transcript of Regular Hearing	\$ 64.10
Deposition of James L. Gluck, M.D.	\$130.60
Deposition of Karen Crist Terrill	\$270.20
Deposition of Larry Leiker	\$171.20
Barber & Associates	
Deposition of Ernest R. Schlachter, M.D.	\$136.80
Deposition of Michael D. McGinnis	\$255.00
Ireland Court Reporting	
Deposition of Jerry D. Hardin	\$375.40
Todd Reporting	
Deposition of Lawrence R. Blaty, M.D.	\$284.50

IT IS SO ORDERED.

Dated this ____ day of June, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Thomas C. Clarkson, Wichita, Kansas
Vaughn Burkholder, Wichita, Kansas
James R. Roth, Wichita, Kansas
William F. Morrissey, Administrative Law Judge
George Gomez, Director